UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JAMES S. DONEGAN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 00-50-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") and Supplemental Security Income ("SSI") appeal raises the issue of whether substantial evidence supports the commissioner=s determination that the plaintiff, who alleges inability to work as a result of back, ankle, seizure and arthritis problems, is capable of performing the full range of sedentary work. I recommend that the decision of the commissioner be affirmed.

The plaintiff applied for SSD and SSI benefits on October 18, 1994. Record at 325. Following adverse decisions initially and on reconsideration, two hearings were held before administrative law judge Thomas A. Powell, at one of which impartial medical expert William J.

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[1] This action is properly brought under 42 U.S.C. §§ 405(g) and 1383(c)(3). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner=s decision and to complete and file a fact sheet available at the Clerk=s Office. Oral argument was held before me on October 5, 2000, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

Hall, M.D. appeared and testified. *Id*. By decision dated August 25, 1995 the administrative law judge found that the plaintiff had been disabled effective July 3, 1994 based on Dr. Hall's testimony that the plaintiff had a condition meeting Listing 1.03 of Appendix 1 to Subpart P, 20 C.F.R. § 404 ("Listings").[2] *Id*. at 328-29. The plaintiff appealed to the Appeals Council, apparently on the ground of error in the determination of onset date, although he delineated no ground in his request for review. *Id*. at 335-38; Plaintiff's Itemized Statement of Specific Errors ("Statement of Errors") (Docket No. 5) at 2.

By decision dated February 27, 1997 the Appeals Council vacated the administrative law judge's decision in its entirety and remanded the case for *de novo* review, noting *inter alia* that "the record did not contain sufficient clinical findings showing that the claimant's impairments met any section of the Listing of Impairments" and "[t]he record also indicated symptoms magnification." Record at 340-41.[3]

On remand, administrative law judge Powell obtained consultative examinations from a medical doctor and a psychologist. *Id*. at 18, 343-46 (report dated June 25, 1997 by David W. Dickison, D.O.), 361-67 (report dated June 26, 1997 by Dr. Dickison), 347-56 (reports dated May 14, 1997 by Ann H. Crockett, Ph.D.). He then held a supplemental hearing at which independent medical, psychological and vocational experts Peter B. Webber, M.D., Erasmus Hoch, Ph.D., and Ira H. Hymoff appeared and testified. *Id*. at 16, 18.

The administrative law judge on *de novo* review, in accordance with the commissioner=s sequential evaluation process, 20 C.F.R. §§ 404.1520, 416.920; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), found, in relevant part, that the plaintiff's statements

[2] Listing 1.03 pertains to arthritis of a major weight-bearing joint.

[3] The Appeals Council also remanded in part because the hearing cassette had been certified as lost, rendering the record incomplete. (continued…)

regarding his symptoms and limitations were not fully credible, Finding 3, Record at 29; that the plaintiff had a severe impairment, a bilateral ankle instability disorder, but did not have an impairment or combination of impairments that met or equaled the Listings, Finding 4, *id*.; that the plaintiff retained the residual functional capacity to perform sedentary work, Finding 5, *id*.; that the plaintiff was unable to return to his past relevant work, Finding 6, *id*.; and that given his age (43) and education (12th grade), application of Rule 201.27 of Table 1, Appendix 2 to Subpart P, 20 C.F.R. § 404 (the "Grid") directed a conclusion that the plaintiff was not disabled, Findings 7-9, *id*. The Appeals Council declined to review the decision, *id*. at 5-6, making it the final determination of the commissioner, 20 C.F.R. §§ 404.981; 416.1481; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner=s decision is whether the determination made is supported by substantial evidence. 42 U.S.C. §§ 405(g), 1383(c)(3); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusion drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

The administrative law judge in this case reached Step 5 of the sequential evaluation process, at which stage the burden of proof shifts to the commissioner to show that a claimant can perform work other than his past relevant work. 20 C.F.R. §§ 404.1520(f), 416.920(f); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987); *Goodermote*, 690 F.2d at 7. The record must contain positive evidence in support of the commissioner=s findings regarding the plaintiff=s residual work capacity to perform such other work. *Rosado v. Secretary of Health & Human Servs.*, 807 F.2d 292, 294 (1st Cir. 1986).

Record at 340.

The plaintiff asserts that the commissioner erred in (i) rejecting testimony of Drs. Webber and Hoch stating or implying that the plaintiff had a condition meeting Listing 12.07, (ii) failing to develop the record fully regarding that condition, (iii) applying the Grid rather than relying on properly developed testimony of the vocational expert present at the *de novo* hearing and (iv) improperly applying the burden of proof. Statement of Errors at 3-12. On the basis of any one of these alleged errors, the plaintiff seeks remand with award of benefits. *Id*. at 12. I discern no error warranting grant of the requested relief.

I. Discussion

A. Expert Testimony

The plaintiff identifies the administrative law judge's failure to accept the testimony of Drs. Hoch and Webber stating or implying that he met Listing 12.07 as "[t]he most significant error here." Statement of Errors at 3. In the plaintiff's view, "[i]nstead of rejecting the psychologist's testimony, the ALJ should have granted benefits at step three." *Id*. at 6.

At the plaintiff's *de novo* hearing the administrative law judge asked Dr. Hoch, a psychologist, whether he could rule out the presence of certain listed mental conditions, including somatoform disorder (Listing 12.07). Record at 69-74. Dr. Hoch could not rule out the possibility of somatoform disorder, citing both (i) extensive evidence of record that the plaintiff reported pain symptoms disproportionate to the objective medical findings in his case and (ii) Dr. Hoch's own observation that the plaintiff did not appear to be a malingerer. *Id*. at 71-74.[4] The administrative law judge then stated: "[A]t this time I'm not going to go into the degree of limitations because I don't find a valid

[4] The administrative law judge interrupted Dr. Hoch's testimony regarding malingering, stating: "You're not a medical doctor" and suggesting that Dr. Hoch was not qualified to assess whether the plaintiff had medical conditions that could cause pain. Record at 73-74. Dr. Hoch amended his response, stating: "Just as a lay person, let's put it that way, from the way he behaved it seemed to me, and again I'm not a physician, that I would think there was some pain there." *Id*. at 74. Dr. Hoch later testified that it is within the purview of psychology to deal with issues of chronic pain. *Id*. at 82.
(continued…)

psychological profile here." *Id*. at 74. The plaintiff's attorney later asked Dr. Hoch point-blank whether the plaintiff met Listing 12.07. *Id*. at 85. Dr. Hoch responded that he did. *Id*.

Dr. Webber, a physician, testified that although he did not believe the plaintiff met a listing, "[t]here's one proviso that I was considering which has already been brought up and that is a 12[.]07." *Id*. at 76. Dr. Webber explained: "[A]s far as equalling any of the musculoskeletal listings, if I went solely by the chart I, I would have trouble finding enough to say that he equals the listing there. If I went solely by what he states I would say he might meet, excuse me, he might equal 1.03. But I think that is more accurately considered under the 12 listings as far as the degree of trouble he has." *Id*. The plaintiff's attorney attempted to ask Dr. Webber whether, in his opinion, the plaintiff met Listing 12.07; however, the administrative law judge refused to permit the testimony on the basis that Dr. Webber was not a psychiatrist. *Id*. at 88.[5]

Listing 12.07 provides in its entirety:

> 12.07 *Somatoform Disorders*: Physical symptoms for which there are no demonstrable organic findings or known physiological mechanisms.
>
> The required level of severity for these disorders is met when the requirements in both A and B are satisfied.
>
> A. Medically documented by evidence of one of the following:
>
> 1. A history of multiple physical symptoms of several years duration, beginning before age 30, that have caused the individual to take medicine frequently, see a physician often and alter life patterns significantly; or
>
> 2. Persistent nonorganic disturbance of one of the following:
>
> a. Vision; or
>
> b. Speech; or
>
> c. Hearing; or
>
> d. Use of a limb; or
>
> e. Movement and its control (e.g., coordination disturbance, psychogenic seizures, akinesia, dyskinesia; or
>
> f. Sensation (e.g., diminished or heightened).

[5] The plaintiff characterizes Dr. Webber as having implied that the plaintiff met Listing 12.07, *see* Statement of Errors at 3; however, I construe Dr. Webber's testimony as at most suggesting that, by virtue of a combination of somatoform disorder and ankle disorders the plaintiff might equal Listing 1.03.

3. Unrealistic interpretation of physical signs or sensations associated with the preoccupation or belief that one has a serious disease or injury;
AND

B. Resulting in three of the following:

1. Marked restriction of activities of daily living; or

2. Marked difficulties in maintaining social functioning; or

3. Deficiencies of concentration, persistence or pace resulting in frequent failure to complete tasks in a timely manner (in work settings or elsewhere); or

4. Repeated episodes of deterioration or decompensation in work or work-like settings which cause the individual to withdraw from that situation or to experience exacerbation of signs and symptoms (which may include deterioration of adaptive behavior).

In his *de novo* decision the administrative law judge determined that, notwithstanding Dr. Hoch's testimony, the plaintiff did not have a condition meeting Listing 12.07. In so doing the administrative law judge pointed out, correctly, that "[t]estimony, even from a psychologist or an M.D., that a listing is met does not automatically make it so." Record at 24; *see also* 20 C.F.R. §§ 404.1527(e)(2) & (f)(2)(iii), 416.927(e)(2) & (f)(2)(iii) (medical expert's opinion on whether claimant meets listings non-binding on commissioner). The administrative law judge noted that Dr. Hoch did not correlate his opinion to the Listing criteria and that the record as a whole did not support a finding that any of the "B" criteria (let alone three) were met. Record at 24-25. The plaintiff points to no evidence of record that he meets the "B" criteria, *see generally* Statement of Errors, and I find nothing indicating that he meets the final three. To the contrary, there is positive evidence that the plaintiff does not meet them. *See, e.g., id*. at 354-55 (report of Dr. Crockett). In sum, the administrative law judge appropriately queried whether the Hoch medical opinion was corroborated by the record as a whole, making a supportable determination that it was not.[6]

[6] The plaintiff further contended, both in his Statement of Errors and at oral argument, that the Step 3 determination was flawed by the administrative law judge's repeated cutoff of the testimony of both Drs. Hoch and Webber regarding Listing 12.07. *See* Statement of Errors at 5-6. In the plaintiff's view, this conduct offended his constitutional right to due process of law, *see id*., or, at a minimum, fell short of satisfying the obligation of the commissioner to develop (or at least facilitate development of) an adequate record. The record does indeed reveal that the administrative law judge aggressively questioned or cut off testimony regarding Listing 12.07. As troubling as I find this approach, I am constrained to conclude that no reversible error occurred. The plaintiff's counsel at oral argument suggested that, had he not been cut off, he would have questioned both Drs. Hoch and Webber as to whether the plaintiff met the (continued…)

B. Development of Record

The plaintiff next contends that the administrative law judge erred when, upon rejecting Dr. Hoch's testimony that the plaintiff met Listing 12.07, he failed to further develop the record regarding somatoform disorder. Statement of Errors at 7-8. As the First Circuit has explained:

> In most instances, where appellant himself fails to establish a sufficient claim of disability, the Secretary need proceed no further. Due to the non-adversarial nature of disability determination proceedings, however, the Secretary has recognized that she has certain responsibilities with regard to the development of evidence and we believe this responsibility increases in cases where the appellant is unrepresented, where the claim itself seems on its face to be substantial, where there are gaps in the evidence necessary to a reasoned evaluation of the claim, and where it is within the power of the administrative law judge, without undue effort, to see that the gaps are somewhat filled as by ordering easily obtained further or more complete reports or requesting further assistance from a social worker or psychiatrist or key witness.

Heggarty v. Sullivan, 947 F.2d 990, 997 (1st Cir. 1991) (citation and internal quotation marks omitted).

While a record (including this one) always could be better developed, I conclude that the record in this protracted case was adequately developed as a matter of law. First and foremost, the plaintiff at all relevant times was represented by counsel, removing this case from the ambit of those in which the commissioner can be said to have a heightened duty of record development. Second, although evidence relating to mental impairment was not abundant, it was sufficient to permit a reasoned decision regarding its presence and the extent of limitation it imposed.

The plaintiff had never been diagnosed with or treated for somatoform disorder; indeed, he could recall only one instance in 1974 or 1975 in which he sought psychiatric treatment (for a problem

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particularized criteria of Listing 12.07. However, the record reveals that after asking Dr. Hoch whether the plaintiff met the listing, counsel did not attempt to follow up with any further questions, instead turning his attention to Dr. Webber. *See* Record at 85. Nor did counsel lodge an objection when the administrative law judge denied permission to question Dr. Webber regarding Listing 12.07. *See id*. at 88. Interestingly, the administrative law judge asked counsel to brief that very matter. *See id*. Counsel did submit a post-hearing brief; however, it did not address the issue of the cutoff of Dr. Webber's testimony. *See id*. at 389-91. Finally, the plaintiff's counsel conceded at oral argument that he did not make a proffer of evidence at the hearing. Under all of these circumstances, I (continued…)

sleeping). *See* Record at 44-45. Although the administrative law judge disagreed with Dr. Hoch's opinion that the plaintiff had a somatoform disorder of sufficient severity to meet Listing 12.07, he apparently was persuaded that the plaintiff did have such a condition, noting its presence on a Psychiatric Review Technique Form. *Id*. at 31. He nevertheless concluded that the disorder imposed no functional limitations. *Id*. at 31-33.

The record was sufficiently developed to allow the administrative law judge to reach this conclusion. First, the administrative law judge found the plaintiff only partially credible, *see id.* at 25, a determination that the plaintiff does not appear to challenge here, *see generally* Statement of Errors. The administrative law judge based this judgment not only on a lack of objective medical evidence something that could be explained by the presence of somatoform disorder but also on the plaintiff's demeanor, prior inconsistent statements and indications that the plaintiff had been able to engage in such activities as hunting and horseback riding. *See id*. at 26.

Second, the administrative law judge had the benefit of the then-recent detailed written report of a second psychologist, Dr. Crockett, based on a face-to-face evaluation. Dr. Crockett's report is devoid of any mention of somatoform disorder, *see id*. at 347-56, and one can only speculate as to whether she actively considered and ruled it out. Nonetheless, she found virtually no impairment in mental ability to perform work-related activities, expressly noting that "[p]ain [the plaintiff] describes would cause distraction slight this was visible today." *Id*. at 354-56.

While a followup query to Dr. Crockett concerning her impressions (if any) on the issue of somatoform disorder would have been ideal, it was not necessary. This was not a case in which "there [were] gaps in the evidence necessary to a reasoned evaluation of the claim."

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cannot find the commissioner responsible for any gaps in the development of the record at Step 3.

C. Use of Grid/Misuse of Vocational Expert

In his third statement of error the plaintiff contends that the administrative law judge erred in relying on the Grid at Step 5, having failed to make proper use of the services of the vocational expert he had summoned to the *de novo* hearing. Statement of Errors at 8-11.

When a claimant's impairments involve only limitations related to the exertional requirements of work, the Grid provides a "streamlined" method by which the commissioner can meet his burden of showing there is other work a claimant can perform. *Heggarty*, 947 F.2d at 995. However, in cases in which the claimant suffers from nonexertional as well as exertional impairments, the Grid may not accurately reflect the availability of other work he or she can do. *Id.* at 996; *Ortiz v. Secretary of Health & Human Servs.*, 890 F.2d 520, 524 (1st Cir. 1989). Whether the commissioner may rely on the Grid in these circumstances depends on whether a nonexertional impairment "significantly affects [a] claimant's ability to perform the full range of jobs" at the appropriate exertional level. *Ortiz*, 890 F.2d at 524 (citation and internal quotation marks omitted). If a nonexertional impairment is significant, the commissioner generally may not rely on the Grid to meet his Step 5 burden but must rely on other means, typically a vocational expert. *Id.* Even in cases in which a nonexertional impairment is determined to be significant, however, the commissioner may yet rely exclusively upon the Grid if "a non-strength impairment . . . has the effect only of reducing that occupational base marginally." *Id.* "[S]uch a shorthand approach is permissible, so long as the factual predicate . . . is amply supportable." *Id*. at 526.

The plaintiff contends that the administrative law judge in this case failed to factor in significant limitations on his ability to sit (which had been noted by Dr. Dickison) and misjudged the severity of his mental impairment flaws that undermined reliance on the Grid. Statement of Errors

at 11.[7] As discussed above, the administrative law judge made a supportable finding that the plaintiff's mental impairments imposed no functional limitation. Dr. Dickison, who both personally examined the plaintiff and reviewed a number of prior medical charts, Record at 361-62, did indeed note that the plaintiff was limited to sitting "4+ hours (1-2 hours at a time)" but qualified this statement with the notation: " per patient subjective report only he indicates increased back pain with sitting. There were no clinical or objective findings to support this," *id*. at 344. Dr. Dickison went on to conclude: "I feel this claimant has significant work capacity for light/sedentary work." *Id*. at 346. The administrative law judge accordingly properly discredited the purported limitation on sitting. *See, e.g.*, Social Security Ruling 96-7p, *reprinted in West's Social Security Reporting Service*, Rulings 1983-1991 (Supp. 2000-01), at 134 ("If there is no medically determinable physical or mental impairment(s) . . . the symptoms cannot be found to affect the individual's ability to do basic work activities.").[8]

[7] The plaintiff also claims that the administrative law judge posited a flawed hypothetical question to vocational expert Ira Hymoff, whom he asked to assume that the plaintiff was capable of light work. Statement of Errors at 9. Inasmuch as the administrative law judge ultimately neither found the plaintiff capable of light work nor relied on the Hymoff testimony, *see* Record at 28, any such error was harmless.

[8] While not directly assailing Dr. Dickison's report, the plaintiff contends that his back ailment "show[ed] up on x-rays as a straightening of the lordotic curve normally present in the human back." Statement of Errors at 3. The plaintiff refers to a September 1992 independent medical examiner report by James F. Findlay, D.O., prepared as the result of a July 1988 incident in which the plaintiff slipped at work. *See* Record at 218-24. Dr. Findlay reviewed three sets of x-rays taken in 1979, 1988 and 1992, observing that each showed a straightened lumbar lordosis, which he noted is "usually indicative of paravertebral spasm." *Id*. at 221. "Lordosis" is defined as "[a]bnormal anterior convexity of the spine." Taber's Cyclopedic Medical Dictionary 834 (1981). "Paravertebral" means "[a]longside or near the vertebral column." *Id*. at 1048. Although Dr. Dickison apparently did not review Dr. Findlay's report, *see* Record at 362, he stated that "X-ray reports from the late 1980s and early 1990s regarding the back indicated normal findings," *id*. at 367. The administrative law judge was entitled to resolve this conflict in the medical evidence. *See, e.g.*, *Rodriguez*, 647 F.2d at 222 ("The Secretary may (and, under his regulations, must) take medical evidence. But the resolution of conflicts in the evidence and the determination of the ultimate question of disability is for him, not for the doctors or for the courts.").

D. Burden of Proof

The plaintiff finally asserts that the administrative law judge failed to carry his Step 5 burden of adducing affirmative proof that the plaintiff was capable of the full range of sedentary work, impermissibly relying solely on a finding of lack of credibility. Statement of Errors at 12. To the contrary, and for the reasons described above, the assessments of Drs. Crockett and Dickison provided affirmative evidence that despite his physical and mental ailments the plaintiff could perform sedentary work.

II. Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge=s report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court=s order.

Dated this 6th day of October, 2000.

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David M. Cohen
United States Magistrate Judge

ADMIN

U.S. District Court
District of Maine (Portland)

CIVIL DOCKET FOR CASE #: 00-CV-50

DONEGAN v. SOCIAL SECURITY, COM Filed: 02/29/00
Assigned to: JUDGE GENE CARTER
Referred to: MAG. JUDGE DAVID M. COHEN
Demand: $0,000 Nature of Suit: 863
Lead Docket: None Jurisdiction: US Defendant

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Cause: 42:405 Review of HHS Decision (DIWC)

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